he did not know the victim's condition when he left the house. 3A Wigmore, *Evidence* §1042 (Chadborne rev. 1970). *Cf. United States v. Ramirez*, 441 *F. 2d.* 950 (1971), *cert.* den. 404 *U.S.* 869 (1971), reh. den. 404 *U.S.* 987 (1971); *Sharp v. United States*, 410 *F.2d.* 969 (5 Cir. 1969); *State v. Jackson*, 201 *F.2d.* 279 (1968), *cert.* den. 394 *U.S.* 908 (1969); *State v. Laskey*, 21 *Ohio St.* 2*d.* 187, 257 *N.E.2d.* 65 (1970); *People v. Calhoun*, 33 *Mich.App.* 141, 189 *N.W.2d.* 743 (Ct.App. 1971); *People v. Graham*, 29 *Mich. App.* 528, 185 *N.W.2d.* 627 (1971), aff'd. 386 *Mich.* 452, 192 *N.W.2d.* 255 (1971); *People v. Farley*, 267 *Cal.App.2d.* 214, 72 *Cal.Rptr.* 855 (1968); *May v. State*, 211 *So.2d.* 845 (Miss.Sup.Ct. 1968); *Merritt v. State*, 107 *Ga.* 675, 34 *S.E.* 361 (1899).

As a matter of common sense, it would have been natural for petitioner to immediately seek medical aid for his friend, or tell someone of the "accident" to insure his friend woud receive medical attention. This is especially true if, as the petitioner testified, the shooting occurred accidentally, and petitioner was unaware of whether his friend was alive or dead when he left the house. Petitioner's silence and inaction cannot reasonably be viewed as an exercise of his Fifth Amendment privilege in this context. It is respectfully submitted that petitioner's failure to act as a reasonable person would have acted if he were involved in an accidental shooting is relevant in assessing the credibility of petitioner's trial testimoney.

Furthermore, petitioner's failure several hours later to tell the police of the accidental shooting was also inconsistent with his trial testimony. Since petitioner testified that he did not know the condition of his friend although he obviously knew that Shorty had been shot, the victim might still have been alive and in need of medical assistance. Petitioner was not arrested by the police for shooting his friend; he was arrested in Clementon, New Jersey for breaking and entering a tire store, a crime totally unrelated to the shooting. There is no suggestion petitioner thought he was under arrest for anything other than the breaking-entry charge. At the time of his arrest neither the police in Clementon nor the police in Camden were aware of the shooting incident.

The fact that petitioner failed to inform the police of the occurrence is significant since the police officers were the only known persons, other than Mrs. Adams, with whom the defendant had come into contact after the shooting. Thus, aside from

petitioner's failure to immediately seek out aid or seek out anyone to obtain aid, he failed to relate the incident and the fact that his friend was wounded when given the opportunity.

Petitioner relies on the decision in *Fowle v. United States*, 410 *F.2d.* 48 (9th Cir. 1969) in support of his contention that there is a split of authority among Circuit Courts of Appeal created by the decision in the case at bar. He fails to appreciate a fundamental distinction between this case and *Fowle*. In *Fowle* the defendant was asked on cross-examination whether at the time of his arrest on narcotics charges he remained silent instead of offering his exculpatory explanation that he was working undercover for one of the narcotic agents. *Fowle* answered that he had remained silent. On the basis of this Court's decision in *Grunewald v. United States*, 353 *U.S.* 391 (1957), the court in *Fowle* held that prior statements are admissible for impeachment only if they are *in fact* inconsistent with statements made at trial. Since the government admitted that *Fowle* was properly exercising his privilege to remain silent in the face of custodial interrogation and was under no duty to respond to the officer's accusations, the Court concluded that there was no inconsistancy between his silence after arrest and his trial testimony. Thus, the gist of the decision in *Fowle* is that it is not inconsistent for an accused to stand mute or claim his privilege against self-incrimination in the face of police interrogation about the crimes for which he is in custody.

The distinction between *Fowle* and the case at bar is apparent: the prosecutor's questions in this case did not relate to silence in the face of accusation. It concerned petitioner's failure to seek medical assistance or tell "anyone" about the alleged accident after the occurrence and before the police were notified and became aware of the shooting.

All of the decisions cited by petitioner as consistent with the opinion in *Fowle* merely reiterate that before the pretrial conduct or "non-utterance" of a defendant can be used to impeach his credibility, it must be demonstrated to be inconsistent with his testimony at trial. Silence in the face of an accusation while in custody is not deemed inconsistent with an exculpatory explanation at trial. *Robideau v. Rhay*, 431 *F.2d.* 880 (9th Cir. 1970); *United States v. Semenshon*, 421 *F.2d.* 1206 (2nd Cir. 1970); *United States v. Nolan*, 416 *F.2d.* 588 (10th Cir. 1967); *United States v. Brinson*, 411 *F.2d.* 1057 (6th Cir. 1969);

Fagundes v. United States, 340 *F.2d.* 673 (1st Cir. 1965). The courts of New Jersey have long recognized this principle. See *State v. Ripa*, 45 *N.J.* 199 (1965); *State v. Griffin*, 120 *N.J.Super.* 13 (App.Div. 1972), certif. den 62 *N.J.* 73 (1972).

There was ample justification for the finding of both the New Jersey courts and the United States Court of Appeals that petitioner's conduct in failing to seek medical assistance or tell anyone that his friend was wounded was in fact inconsistent with his "accident" explanation at trial. This finding is not in conflict with the decisions of other jurisdictions and circuits, but is logically reconcilable.

The argument that petitioner raises of a possible conflict occuring between jurisdictions if comment is made by the prosecutor on silence in the face of accusation for purposes of impeachment is interesting but not involved in the case at bar. That contention, and the controlling effect of *Harris v. New York*, 401 *U.S.* 222 (1971), was the central issue in *United States v. Ramirez*, *supra*, 441 *F.2d.* 950 (5th Cir. 1971), *cert.* den. 404 *U.S.* 869 (1972) and in *People v. Calhoun*, *supra*, 33 *Mich. App.* 141, 189 *N.W.2d.* 743 (Ct.App. 1971). The majority opinion of the Court of Appeals below referred to the decisions in *Harris* and *Ramirez* by way of analogy, but these cases were not necessary to the resolution of the issue.

Nevertheless, the State agrees with *Ramirez* and *Calhoun* that the reasoning of this Court in *Harris* would seem equally applicable to inconsistent conduct or inconsistent "non-utterances" as to inconsistent statements, *i.e.* "(t)he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 *U.S.* at 226.

Since the case at bar does not involve comment on silence in the face of accusation, it does not present the Court with an opportunity to "clearly delineate the parameters of its prior holding in *Harris*," as petitioner urges. Consequently, it is the State's view that petitioner has failed to demonstrate sufficient grounds for granting certiorari since there are no "special or important reasons" involved and the decision is in accord with prior applicable decisions of this Court and other courts of appeals.

CONCLUSION

For all the foregoing reasons, respondent, State of New Jersey, respectfully prays that the writ of certiorari sought in the above named petition pending before this court not issue.

Respectfully submitted,

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